Supreme Court, U.S.
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No. 85-628

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

KENNETH P. BIPPUS, et. al.,

Petitioners,

vs

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et. al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

Brief in Opposition for Respondents Reading Central Mixed Concrete, Inc. and Clyde W. Woeber

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QUESTIONS PRESENTED

1. Where Petitioners were fully aware that their union would not pursue a grievance which is the basis of the alleged claim, and knew or should have known that a breach of fair representation had occurred, does the pendency of an unfair labor practice charge toll the running of the six month statute of limitations applicable to a "hybrid" Section 301 suit?

2. Whether this Court's decision in *DelCostello v. International Brotherhood of Teamsters* establishing a six month statute of limitations for hybrid Section 301 cases should be applied retroactively where the retroactive or prospective application of the decision will not alter the holdings below of the District Court and the Sixth Circuit Court of Appeals?

3. Whether the decision of the District Court below, which was affirmed by the Sixth Circuit Court of Appeals, properly awarded summary judgment in favor of Respondents where Petitioners' own testimony clearly revealed that Petitioners' claim was barred by the applicable statute of limitations?

RULE 28.1 RELATED PARTIES STATEMENT

Clyde W. Woeber
Reading Central Mixed Concrete, Inc.
No parent companies, subsidiaries (except wholly owned) or affiliates exist.

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OPINIONS BELOW

The opinion of the District Court for the Southern District of Ohio and the opinion of the Court of Appeals for the Sixth Circuit, both unreported, are set forth in the Appendix to this Brief in Opposition.

STATEMENT OF THE CASE

A. *Procedural Posture.*

On November 16, 1981, approximately nine months after the date on which Respondents became aware that the grievances they filed would not be pursued by their local union, Petitioners filed a complaint in United States District Court for the Southern District of Ohio. The complaint, a hybrid Section 301 suit, alleged, among other claims, that Respondents Reading Central Mixed Concrete, Inc. ("Reading") and Clyde W. Woeber breached a collective bargaining agreement that existed between Reading and Local 100 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America ("Local 100"). Petitioners are members of Local 100.

All of the Respondents, after conducting discovery, filed motions for summary judgment and motions to dismiss on the basis that Petitioners' claim was barred by the statute of limitations. On January 10, 1984, Judge Hogan for the District Court of the Southern District of Ohio granted Respondents' motions for summary judgment and dismissal. (App. A at p. 12a).

Petitioners appealed this decision to the Sixth Circuit Court of Appeals on February 2, 1984 solely on the basis that Judge Hogan incorrectly determined that the six month statute of limitations period accrued in late January or early February of 1981. During the pendency of the appeal with the Sixth Circuit, Petitioners moved the Sixth Circuit to stay its proceedings and remand the case to the District Court for the limited purpose of allowing the District Court to hold an evidentary hearing on a Rule 60(b) Motion filed by Petitioners. Petitioners filed the motion on December 28, 1984, which requested that the District Court vacate its judgment to allow Petitioners to amend their complaint to allege a new cause of action. The Sixth Circuit affirmed the District Court's opinion awarding summary judgment to Respon-

dents, and denied Petitioners' Motion to Stay Proceedings and For Limited Remand. (App. B at p. 5b).

After the date on which the initial District Court complaint was filed by Petitioners, and after the filing of the appeal to the Sixth Circuit Court of Appeals by Petitioners, Petitioners filed a second complaint in the United States District Court for the Southern District of Ohio against the same Respondents alleging different causes of actions based upon the same occurrences as alleged in the complaint initially filed by Petitioners. The second lawsuit, filed on March 20, 1984, remains pending. Petitioners have now filed their Writ for Certiorari with this Court from the Sixth Circuit's Opinion filed on July 17, 1985.

B. *Statement of Facts.*

Plaintiffs are former employees of Reading who were not hired by SDI Reading Concrete, Inc. ("SDI") when Reading sold its business to SDI in January of 1981. Reading, as a result of the sale of its business, laid off its employees on the last working day of 1980. The sale occurred on January 2, 1981, and prior to that date, SDI made no commitment as to the number of Reading employees that would be hired.

SDI hired a portion, but not all, of the Reading employees in January of 1981. SDI also recognized Local 100 as the collective bargaining agent for its employees and negotiated a new collective bargaining agreement with Local 100. Local 100 failed to execute the agreement and later was forced to do so by the NLRB issuing a complaint enforcing the collective bargaining agreement.

On February 5, 1981, Local 100 filed an unfair labor practice charge claiming that SDI was the alter ego of Reading and that SDI was obligated to perform under the collective bargaining agreement that was executed between Reading and Local 100. This charge was dismissed on March

18, 1981 by the Regional Director for the Cincinnati Region of the NLRB. (App. A at p. 13a n. 2).

On April 30, 1981, Local 100 filed another charge with the NLRB alleging that SDI's failure to hire several of the Reading employees was based upon their prior union involvement. This charge was also dismissed, with such dismissal being affirmed by the NLRB's general counsel. (App. A at p. 13a n. 2).

Petitioner Donald Browning ("Browning"), who was the union steward for Petitioners while employed at Reading, filed grievances alleging that the discharge of Petitioners was in violation of the existing collective bargaining agreement between Reading and Local 100. These grievances were filed on January 12 and 13 of 1981. (App. A at p. 7a).

In late January of 1981, Browning became fully aware that the Petitioners' grievances would not be pursued by the union. Browning specifically stated that in January of 1981, he was told by Local 100 president Kiser that Petitioners, as a group, "needed to go another route" because Local 100 had no intention of processing the Petitioners' grievances. (App. A at p. 8a).

Browning further stated that Local 100 president Kiser told him that the Reading employees were nothing but a "burr under his saddle" and that "he'll be glad when [they] are all gone." Local 100 president Kiser told Browning at that time that Local 100 would do nothing concerning the Petitioners' grievances and that the union would not spend any additional money on the Petitioners' grievances. (App. A at p. 8a).

Browning emphatically stated that Local 100 never processed the grievances in any manner. He stated that he continually asked Local 100 business agent Watson about the grievances, and that he received no response. He was continually told that nothing would be done with the

Petitioners' grievances until Local 100 president Kiser consented to such action. Browning had no discussion with Local 100 president Kiser after January of 1981. (App. A at p. 8a).

In light of the statements made by Browning, the Petitioners were fully aware that the grievances would not be pursued by Local 100. The grievances were not pursued by Local 100 and were not processed to arbitration. (App. A at p. 12a).

SUMMARY OF ARGUMENT

The issues raised by Petitioners in their Petition for Writ of Certiorari do not warrant review by this Court. First, there is no conflict among the Circuits on the question of whether a pending NLRB action tolls the six month statute of limitations that applies to hybrid Section 301/fair representation actions. Those circuit and district courts that have addressed this issue have held that the statute is not tolled by a pending NLRB action. Furthermore, this Court has held, in the substantially similar situation of Equal Employment Opportunity Commission ("EEOC") and Section 1981 claims, that the filing of an EEOC charge does not toll the running of the limitations period for a Section 1981 action based on the same facts.

Petitioners' argument raised for the first time in this Court, that this Court's *DelCostello* decision should not be applied retroactively, was waived by their agreement to its retroactive application in the District Court below. Additionally, the former Ohio statute of limitations period for Section 301 actions was ninety days, so that Petitioners' cause would not be aided even if *DelCostello* were not retroactively applied. Therefore, this Court's determination of this issue would not alter the decisions of the District Court and the Sixth Circuit Court of Appeals.

Finally, none of the issues raised by Petitioners as "important questions of federal labor law" were essential to the holdings of the Sixth Circuit and District Court in this case. Thus, even if this Court was to review this case on the merits, it would have no occasion to reach those issues of alleged importance.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETITIONERS' REQUEST FOR REVIEW RAISES NO ISSUES OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY THIS COURT, AND THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL ON THE ISSUES RAISED BY PETITIONERS.

A. The Statute of Limitations for a hybrid Section 301/ fair representation case is not tolled by the Filing of the Unfair Labor Practice Charge.

1. *Courts that have addressed the issue are in unanimity that the statute of limitations is not tolled.*

Petitioners argue that the filing of an unfair labor practice charge with the National Labor Relations Board ("NLRB") should toll the six month statute of limitations held applicable to hybrid Section 301/fair representation actions by this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). While this Court has never ruled on this precise issue, those Courts of Appeals which have ruled on this issue are in agreement that the filing of an unfair labor practice charge with the NLRB does not stop the running of the six month statute of limitations applicable to Section 301 actions.

The United States Court of Appeals for the Fourth Circuit in *Kolomick v. United Steelworkers of America, Dis-*

trict 8, ALF-CIO, 762 F.2d 354 (4th Cir. 1985) stated that "[a] rule tolling the time period within which to file a § 301 claim in federal court simply by virtue of filing a claim with the NLRB would be contrary to the rationale underlying *DelCostello* and would not effectuate congressional goals." *Id* at 356. The United States Court of Appeals for the Eighth Circuit reached the same conclusion in *Aarsvold v. Greyhound Lines, Inc.,* 724 F.2d 72, 73 (8th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S. Ct. 3538 (1984).

Petitioners point to the Ninth Circuit's decision in *Aragon v. Federated Department Stores Inc.,* 750 F.2d 1447 (9th Cir. 1983), as a case "conflicting" with the other circuits. However, that case did not hold that the filing of a NLRB charge would toll the statute of limitations. The court did not reach the issue because on the facts of that case, no equitable tolling had occurred. In fact, the *Aragon* court recognized that in light of *DelCostello,* "the federal courts may also be precluded from borrowing the states' tolling provisions." *Id.* at 1454. The court noted in dicta that *if* it were appropriate to apply a state's tolling provision to a Section 301 action, then under California law a pending NLRB action might under some circumstances toll the running of the statute. *Id.* However, Petitioners are incorrect when they assert that the Ninth Circuit's approach "appears to vary" from those of the Sixth and Fourth Circuits. The Ninth Circuit, having never been squarely faced with this issue, has refrained from ruling on it.

Thus, contrary to Petitioners' assertion, there is no conflict among the circuits on this question. In fact, virtually all courts that have considered the question of whether an NLRB charge tolls the limitations period for filing a § 301 action have held that it does not. *See, e.g., Former Frigidaire Employees Ass'n v. International Union of Electrical Workers,* 573 F. Supp 59, 61 (S.D. Ohio 1983); *Association of Frigidaire Model Makers v. General Motors Corporation,* 573 F.Supp 236, 269 (S.D. Ohio 1983); *Estades v. Harry M. Stevens, Inc.,*

593 F. Supp 778, 782 (D. P.R. 1984); *Bey v. Williams,* 590 F. Supp. 1150, 1154 (W.D. Pa. 1984); *Boyd v. Teamsters Local 553,* 589 F. Supp. 794, 796 (S.D.N.Y. 1984). Far from championing a cause which is the subject of dispute among the circuits, Petitioners are asking this Court to decide a question on which there currently is unanimity among courts that have addressed the issue.

2. This Court has decided against tolling under substantially identical facts.

These decisions holding against tolling are in line with this Court's holding in *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 455 (1975). In *Johnson,* this Court held that the timely filing of a charge with the Equal Employment Opportunity Commission ("EEOC") pursuant to Section 706 of Title 7 did not toll the running of the statute of limitations applicable to an action, based on the same facts, which was brought under Title 42 U.S.C. § 1981. The reasoning of this Court in *Johnson* is particularly applicable to this case as there is no policy reason that excuses Petitioners' failure to take the minimal steps necessary to preserve each claim independently.

Additionally, tolling of the statute of limitations during the pendency of an NLRB charge would unreasonably protract labor disputes. This is inconsistent with this Court's strong policy of favoring the prompt resolutions of labor disputes. *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 63-64 (1981).

B. Petitioners Raise For The First Time The Retroactivity Issue Which If Decided by this Court Would Not Alter The Decisions Of the District Court And The Sixth Circuit Below On The Facts Of This Case.

Petitioners assert that this Court's decision in *DelCostello* establishing a six month statute of limitations in a "hybrid" § 301/fair representation case should not be applied

retroactively. It should be noted that Petitioners raise this issue of non-retroactivity for the first time in this Court. This issue was not raised in the Petitioners' brief to the Sixth Circuit, and in fact, Petitioners conceded in the District Court that *DelCostello* should be given retroactive effect. (App. A at p. 5a). Therefore, Petitioners have waived this issue, and it properly should not be considered by this Court. *See, Kosak v. United States,* ____ U.S. ____, 104 S.Ct. 1519, 1522 n.2 (1984); *United States v. Lovasko,* 431 U.S. 783, 787 n.7 (1977).

However, even if this issue of retroactivity is not waived, this Court does not have reason to address it on the facts of this case. Before *DelCostello,* federal courts appling Ohio law had consistently held that the appropriate statute of limitations for § 301 claims was the Ohio Statute of Limitations governing suits to vacate arbitration awards, which is a period of ninety days. *See, e.g., Lawson v. Truck Drivers, Chauffers and Helpers, Local Union 100,* 698 F.2d 250, 253-54 (6th Cir. 1983); *Rachubka v. Incom International,* 555 F.Supp. 552 (N.D. Ohio 1982); *Ward v. Alside, Inc.,* 550 F.Supp. 1074, 1076-77 (N.D. Ohio 1982); *Lamore v. Innland Division of General Motors Corp.,* 550 F.Supp. 1005, 1015 (S.D. Ohio 1982); *Baldridge v. Arkansas Best Freight System Inc.,* 550 F.Supp. 1159, 1170 (S.D. Ohio 1982). Thus, *DelCostello* actually extended Petitioners' time for filing their § 301 claim under the facts of this case, and if this Court were to ignore Petitioners' waiver of this issue and review the question presented, it would not aid the Petitioners in this case.

C. The Decision Below Is Correct Without Regard To Petitioners' Points of Alleged Importance.

The Court of Appeals, in upholding the District Court's decision in this case, found that the evidence showed that Petitioners knew or should have known more than six months prior to the filing of their suit that their cause of action had accrued. The finding was based upon testimony given by Petitioners' former union steward which "amply

reveal[ed] an open hostility and unwillingness on the part of the union president . . . to have anything to do with the [Petitioners'] grievances." (App. B at p. 3b). The Court of Appeals found that this evidence of hostility "was not assuaged or contradicted by . . . the [Petitioners'] false hope of success before the NLRB." (App. B at p. 3b). It is therefore clear that Petitioners knew or should have known of the accrual of their § 301/fair representation claim in January or February of 1981, regardless of the outcome of their NLRB charge. The issue of the running of the limitations period thus resolves itself essentially to a question of fact, not of law. The question of fact being at what time did Petitioners know, or should have known, that the union had breached its duty of fair representation to them.

Thus, even if in some circumstances the filing of an NLRB charge could be said to toll the statute of limitations for a § 301/fair representation action, the decisions of both lower courts in this case rest on the *factual* finding that here, Petitioners knew or should have known of the accrual of their cause of action long before their NLRB claim had been resolved. Petitioners are asking this Court to review a factual finding made by the District Court and upheld by the Sixth Circuit. On the facts of this case, there would be no reason for this Court to reach the "important questions of federal labor law" that Petitioners urge are raised in this case.

CONCLUSION

It is clear that there is no conflict among the Circuit Courts of Appeal on the issues raised in the Petition for Writ of Certiorari. It is also clear that even if important issues are raised in the Petition, this Court would have no occasion to reach them because the decisions of the District Court and the Court of Appeals were correct regardless of Petitioners' points of alleged importance. Therefore, this case raises no issues of sufficient importance to warrant review by this Court.

For all of the above reasons, Respondents Reading Central Mixed Concrete, Inc. and Clyde W. Woeber respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH P. BIPPUS, et al.,	) No. C-1-81-906
Plaintiffs.	) OPINION AND ORDER : GRANTING MOTION OF) DEFENDANTS SDI READ-
vs.	: ING CONCRETE, INC.) AND IRVIN T. SCHARFEN-
LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,	: BERGER FOR SUMMARY) JUDGMENT, GRANTING : MOTION OF DEFEND-) ANTS READING CEN-
Defendants.	: TRAL MIXED CONCRETE,) INC. AND CLYDE W. : WOEBER FOR SUMMARY) JUDGMENT, AND GRANT- : ING MOTION TO DISMISS) OF DEFENDANT TRUCK : DRIVERS, CHAUFFEURS) AND HELPERS LOCAL : NO. 100
HOGAN, S.J.	)

INTRODUCTION

This matter came on for consideration of defendants SDI Reading Concrete, Inc.'s (SDI) and Irvin T. Scharfenberger's second motion for summary judgment (doc. 33), the first motion for summary judgment submitted by those defendants having been denied by this Court approximately one year ago (doc. 25). In addition to the aforementioned second motion for summary judgment, defendants Reading Central Mixed Concrete, Inc. (Reading) and Clyde W. Woeber

have filed a separate motion for summary judgment (doc. 36) and defendant Truck Drivers, Chauffeurs and Helpers Local Union No. 100 has filed a motion to dismiss (doc. 38). This last motion will be treated as a motion for summary judgment. Plaintiffs have filed a memorandum in opposition to defendants SDI's and Irvin Scharfenberger's second motion for summary judgment (doc. 37). By letter of November 29, 1983, plaintiffs' counsel asks this Court to consider the three separate defense motions collectively, maintaining that all three raise the same basic issues. Plaintiffs' counsel states that plaintiffs do not intend to file a separate memorandum in opposition to defendant Reading's and defendant Woeber's motion for summary judgment or to Local 100's motion to dismiss. In this regard, plaintiffs' counsel asks this Court to consider the plaintiffs' memorandum in opposition to the motion of defendants SDI and Scharfenberger for summary judgment as being applicable to all of the aforementioned defense motions. The Court has considered plaintiffs' memorandum in accord with this request. Finally, consideration has also been given to defendant SDI's and defendant Scharfenberger's reply memorandum in support of their second motion for summary judgment (doc. 39).

FACTUAL BACKGROUND

As previously stated by this Court (doc. 25), this case involves various federal and common law causes of action arising out of a labor dispute. The labor dispute was prompted by defendant Woeber's sale of Reading in January, 1981. Prior to the sale, plaintiffs were employees of Reading.

The pertinent facts relating to the labor dispute need not be further set forth in great detail, as they have previously been noted (*see again* doc. 25). In essence, plaintiffs claim that their jobs were protected by a provision, Article 16, found in a collective bargaining agreement then existing (prior to defendant Woeber's sale of Reading) between defend-

ant Reading and defendant Local 100. Plaintiffs maintain that pursuant to Article 16 of the Reading/Local 100 agreement, any purchaser of Reading was bound to assume the entire collective bargaining agreement. Plaintiffs allege that defendants Woeber and Reading violated that agreement by entering into a purchase agreement which did not require such an assumption. Plaintiffs allege further that Local 100 violated its duty of fair representation by failing to enforce the Reading labor agreement. Finally, as stated by plaintiffs' counsel in the memorandum in opposition to the defense motions, plaintiffs' claim for relief against defendants SDI and Scharfenberger is based upon the theory that SDI is the "alter ego" of Reading, and upon the claim that defendants SDI and Scharfenberger conspired with defendant Reading to tortiously interfere with the Reading/Local 100 collective bargaining agreement.

PROCEDURAL BACKGROUND

Preliminarily, it should be observed that the original motion for summary judgment of defendants SDI and Scharfenberger was based upon three principle grounds: (1) a claim that as a matter of law, SDI should not be viewed as being the alter ego of Reading; (2) a claim that if plaintiff prevails on his claims against defendants SDI and Scharfenberger, an impermissible conflict with a NLRB approved settlement would arise; and (3) a claim that plaintiffs failed to timely exhaust available contractual grievance procedures prior to filing this action. (*See generally* doc. 25, p. 4). In denying the original motion for summary judgment this Court held, in response to the aforementioned claims, that: (1) a determination of whether a factual issue exists as to SDI's alter ego status, along with a determination of how much deference should be afforded the investigative findings of the NLRB, was not appropriate prior to the completion of discovery; (2) that because a conflict with the NLRB settlement could only occur from the nature of the relief granted, if any,

concern with a possible conflict was premature; and (3) that plaintiffs would have to be granted the opportunity to demonstrate, via discovery, that a factual issue existed regarding the attempt to timely grieve the disputed discharges. In thus denying the original motion for summary judgment, we closed by stating that defendants were nonetheless free to renew their motion upon completion of discovery (doc. 25, p. 8).

The foregoing review is necessary as plantiffs' opposition to the various defense motions now presented is based in part upon the claim that discovery has not in fact yet been completed. From this, the plaintiffs argue that defendants SDI and Scharfenberger have violated this Court's prior Opinion and Order by prematurely renewing their motion.

Arguably, there may be a question as to whether the aforementioned language directed to defendants SDI and Scharfenberger should be directed as well to the other defendants in this case. Resolution of that question, however, is unnecessary for the reason that the present motions of the various defendants are based largely upon a question involving the statute of limitations, a question which, of course, was not raised earlier.[1] We find no reason why this new issue may not now be raised and considered. As set forth in the pages which follow, careful consideration leads this Court to conclude that plaintiffs' action is indeed barred by the applicable statute of limitations. Judgment will thus be entered in favor of all defendants, as set forth more fully later herein.

PLAINTIFFS' ACTION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The defendants maintain that the six month statute of limitations set forth in Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b), is controlling in this action pursuant to the Supreme Court's recent decision in *DelCostello v. International Brotherhood of*

Teamsters, U.S. , 103 S.Ct. 2281, 113 L.R.R.M 2737 (1983).

It is important to note, first that *DelCostello* did not involve a straightforward breach of contract suit brought under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. 103 S.Ct. at 2289. Rather, in *DelCostello,* as here, suit was brought against both the employer and against the union. As stated in *DelCostello,* the action against the employer is based upon § 301, for breach of a collective bargaining agreement. The action against the union, by contrast, is one for breach of the union's duty of fair representation, a duty "which is implied under the scheme of the National Labor Relations Act." *Id.* at 2290. "The suit is thus not a straightforward breach of contract suit under § 301, . . . but a hybrid § 301/fair representation claim, amounting to 'a direct challenge to the private settlement of disputes under (the collective-bargaining agreement.).' " *Id.* at 2291. In such a situation, the Court reasoned that the "balance of interests" involved would be best served by the application of the NLRA's six month statute of limitations.

Based on the foregoing, there can be no question that the six month NLRA limitation period applies to a hybrid § 301/fair representation suit such as the one at bar. The plaintiff does not contest this reading of *DelCostello.* Just as importantly, the plaintiffs expressly agree with the defendants' contention that *DelCostello* should be given retroactive effect (doc. 37, p.6). This Court concurs in the parties' retroactivity assessment, finding ample case authority to support such a position. *See e.g., Perez v. Dana Corporation, Parrish Frame Division,* No. 82-1547, slip op. (3rd Cir., Sept. 28, 1983); *see also,* the decision of Judge Rice of this District in *Dowty v. Pioneer Rural Electric Cooperative, Inc.,* No. C-1-3-82-005 (S.D. Ohio, Aug. 26, 1983), *appeal docketed,* No. 83-3621 (6th Cir., Sept. 22, 1983) and *McPeek v. Dayton Forging and Heat Treating Co.,* No. C-1-3-83-084 (S.D. Ohio, Aug. 26,

1983); *cf. Foltz v. Teamsters Local Union 414,* Civil No. 83-63 (N.D. Ind., Aug. 8, 1983).

Having determined that *DeCostello's* six month statute of limitations holding applies, two key questions remain open for consideration. First, at what point does the limitations period begin to run? Second, are there any circumstances under which the limitations period can be tolled?

With respect to the first of these questions, Judge Rice, in three well-reasoned opinions, has recently held that hybrid § 301/fair representation action accrues no later than the time plaintiffs *"knew or reasonably should have known that a breach of the duty of fair representation had occurred,* even if some possibility of nonjudicial enforcement remained." *Adkins v. General Motors Corp.*, 113 LRRM 2147, 2151 (S.D. Ohio 1983) (emphasis added); *see again Dowty, supra; McPeek, supra.* We note also that Judge Porter of this District came to this same conclusion in a case decided prior to *DelCostello. See Bowman v. Cincinnati Mine Machinery Co.*, No. C-1-82-1251 (S.D. Ohio, May 4, 1983). Then, too, the Seventh Circuit in *Metz v. Tootsie Roll Industries, Inc.* 715 F.2d 299 (7th Cir. 1983) recently reached this same result. After considering the impact of *DelCostello,* and thus determining that the six month limitations period of the NLRA applied, the Seventh Circuit addressed the commencement issue. The plaintiff claimed that the limitations period had still not yet begun to run, alleging that a final determination had not been made on her request that the union file a grievance. Citing an earlier decision, *Hall v. Printing and Graphic Arts Union, Local No. 3,* 696 F.2d 494 (7th Cir. 1982), the Seventh Circuit observed that under the collective bargaining agreement "the failure to file the grievance had the same finality effect as an arbitration award." 715 F.2d at 303. Thus, "the alleged 'refusal and failure' of the union to act amounted to a final determination." *Id.* With respect to plaintiff's additional argument that she had never been formally notified that her request would not be acted upon, the

Seventh Circuit, in language nearly identical to that found in *Adkins, supra*, held that at some point prior to six months preceding the filing of her suit, the plaintiff *"knew, or at least should have known"* that the union was not taking any action on her behalf. *Id.* at 304 (emphasis added). Official notification was thus clearly unnecessary. *Id. See again, Bowman, supra*, slip op. at 5.

This Court finds the *Adkins* and *Metz* reasoning to be persuasive. We thus hold that in a hybrid § 301/fair representation case the limitations period begins to run no later than the time when the plaintiffs knew or reasonably should have known that a breach of the duty of fair representation had occured. The limitations period with respect to the specific claim against the employer for breach of the collective bargaining agreement, of course, begins to run no later than that same date. *Metz*, 715 F.2d at 306; *Adkins*, 113 LRRM at 2151.

The evidence presented by deposition and affidavit supports the defendants' position that the plaintiffs, who filed their complaint on November 16, 1981, are now time-barred. The evidence shows that Mr. Donald Browning, a plaintiff herein and then union steward for the Reading drivers, filed grievances with the Union on January 12 and 13, 1981 (Browning Dep. pp.47, 48, 65, 78). The Reading drivers had been discharged effective the last working day of 1980 (Browning Aff. ¶ 11). Browning took the grievances to Mr. James Simon and Mr. Paul Lake of SDI. He also presented a copy of the grievances to union president Gerald Kiser and to business agent, Ken Watson (Browning Dep. pp. 48-50).

Browning stated at his deposition that he did everything to ensure that the grievances were properly filed. He stated that under the grievance procedure a meeting with the company was supposed to be arranged within a given number of days (Browning Dep. p.50). He stated that if satisfactory results were not the obtained, the grievances would

thereafter go to arbitration. Browning stated, however, that the union never did anything with grievances. He stated that he kept asking Mr. Watson about the grievances and kept getting put off. *Id.* He stated he was constantly told the same thing, namely that nothing would be done until union president Kiser gave his approval. *Id.*

Concerning his discussions with Mr. Kiser, Browning further stated in his deposition testimony and in an affidavit filed with this Court that in January, 1981 Kiser told him that Reading employees were "nothing but a burr under his saddle" and that "he [would] be glad when [they] [were] all gone." (Browning Dep. p.50; Browning Aff. ¶ 14). Browning stated that on another occasion Kiser told him that he was going to keep out of Reading's business and would do nothing about the grievances and would not spend anymore money on the grievances (Browning Aff. ¶ 14). Browning made this same statement at his deposition (Browning Dep. pp.20, 50).

Finally, we note also that Browning stated at his deposition that it was at about this time, January, 1981, that "as a group [they] decided that [they] needed to go another route." (Browning Dep. p.21). Asked why this was so, Browning answered, "Well, from the statements that was [sic] made from the union." *Id.* Browning continued his answer by indicating that the union attorney, Mr. Bruce Pence, had told them that he could not do anything further for them. *Id.* Despite evidence in the record which established that Bruce Pence did in fact file unfair labor practice charges with the NLRB, and pursue those charges through the appeals stage, all of the foregoing shows very conclusively that by late January, 1981 or early February, 1981, the plaintiffs, through their representative, Mr. Browning, knew or should have known that the union, per union president Gerald Kiser, was not going to act upon their contractual grievances.[2] The breach of the duty of fair representation, therefore, accrued no later than late January, 1981 or early February, 1981. *See* Footnote 2, *supra.* Thus, absent any toll-

ing, the six month limitation period began to run from that time forward.[3]

LIMITATIONS PERIOD NOT TOLLED

Plaintiff's next claim that "regardless of the actual date when the cause of action may have accrued, the statute of limitations would have been tolled from the last week of January until the first week of June" (doc. 37, p.4). Once more, the plaintiffs claim that they were not aware that their NLRB charges had been denied until June, 1981. The claim is made, therefore, that until that time the plaintiffs "were held in limbo" and "waited the outcome of this alternate plan." *(Id.* at pp.3 and 5). In essence, plaintiffs maintain that the pendency of the NLRB charges, which could have obtained satisfactory relief, served to toll the running of the limitations period in this case.

We note first that the Supreme Court did not summarily reject out-of-hand petitioner DelCostello's claim that "certain events" operated to toll the running of the statute in his case. Instead, the Court remanded DelCostello's cause back to the district court for consideration of the tolling issue. 103 S.Ct. at 2294. At the same time, we must also note that the factual situation presented in DelCostello's case was very different from that presented in the case now before us. Specifically, DelCostello claimed that he effectively made a request for reconsideration of an adverse arbitration ruling, a request which alleged tolled the running of the statute. Here, by contrast, the claim is very simply that the pendency of the NLRB charges operates a tolling effect.

The precise argument raised here was recently considered and rejected by Judge Rice. Citing *Santos v. District Council of New York City,* 619 F.2d 963 (2d Cir. 1980), Judge Rice first held generally in *Adkins, supra* that a § 301 action accrues when plaintiffs "knew or reasonably should have known that [a breach of the duty of fair representation] had

occured, *even if some possibility of nonjudicial enforement remained.*" 113 LRRM at 21-51 (emphasis added). Just a few months later in *Association of Frigidaire Model Makers v. General Motors Corp.*, No. C-1-3-81-343 (S.D. Ohio, Sept. 21, 1983) Judge Rice squarely dealt with the NLRB pendency tolling question. Citing *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Hudson v. Teamsters Local Union No. 957*, 536 F. Supp. 1138 (S.D. Ohio 1982), Judge Rice observed that a § 301 action is entirely independent of any and all NLRB proceedings. Slip op. at 4-5. Noting that at least one Court, the First Circuit in *McNutt v. Airco Industrial Gases Division*, 687 F.2d 539 (1st Cir. 1982), had "intimated in dicta" that the filing of a NLRB complaint does not toll the running of the statute of limitations on a § 301 action, Judge Rice denied the tolling claim and dismissed the action as time-barred. *Id.* at 5. *See also* Judge Rice's decision in *Former Frigidaire Employees Association v. International Union of Electrical, Radio and Machine Workers, Local 801*, 573 F. Supp. 59, 61 (S.D. Ohio 1983).

As defendants point out, there is additional general authority which supports Judge Rice's tolling decisions. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 455 (1975), for example, the Supreme Court held that the timely filing of a charge with the EEOC pursuant to § 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, brought under 42 U.S.C. § 1981. The Court expressly found "no policy reason that excuses [plaintiffs'] failure to take the minimal steps necessary to preserve each claim independently." 421 U.S. at 465-66. Interpreting the Supreme Court's decision in *Johnson* as well as the Supreme Court's earlier decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Sixth Circuit in *Guy v. Robbins & Meyers, Inc.* 525 F.2d 124 (6th Cir. 1975), *aff'd in pertinent part sub nom., Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976), stated:

> The court (in *Gardner-Denver)* referred to the legislative history which indicated Congressional intent that any employee could pursue any remedy which he may have under state or federal law. Thus, the employee could file proceedings under the National Labor Relations Act or with other federal, statue or local agencies or pursue contractual remedies. In *Johnson v. Railway Express Agency, supra,* the court held that the various remedies are separate, distinct and independent.'
>
> It would be utterly inconsistent with the thesis of *Gardner-Denver* and *Railway Express Agency* to hold that the pursuit of any of these remedies operates to toll other remedies which the employee has the right to resort to concurrently.
>
> 525 F.2d at 126.

As defendants point out, a policy allowing the § 301 statute of limitations to be tolled indefinitely while a NLRB charge is processed could well reasonably protract labor disputes. This would, in fact, contravene the very strong federal policy favoring the prompt resolution of labor disputes. *See generally, United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 63-64 (1981); *Badon v. General Motors Corp.,* 679 F.2d 93, 97-98 (6th Cir. 1982); *Metz v. Tootsie Roll Industries, supra; Adkins v. General Motors Corp., supra.*

In view of all of the foregoing, this Court holds that on this set of facts the filing of the NLRB charges did not act to toll the running of the six month statute of limitations made applicable by *DelCostello.* Once again, the breach of the duty of fair representation occurred when the union, through its president, Mr. Kiser, flatly refused to process or otherwise consider the grievances filed by the plaintiffs. The evidence previously cited established beyond any question that the plaintiffs, through their representative, Donald Browning, knew or should have known by late January, 1981 or early February, 1981 that nothing would be done on the griev-

ances. The fact that NLRB charges were filed by an attorney presumably compensated by the union does not aid the plaintiffs for this was an independent remedy available to them. As we view it, the union's duty was to fairly represent the plaintiffs by processing their contractual grievances with the company. The union was not under a duty to pursue charges with the NLRB. That the union reluctantly allowed such charges to be filed does not alter the fact that it had been made very clear that nothing would be done on the grievances themselves.

As was the case in *Johnson, supra,* the plaintiffs could easily have taken "the minimal steps necessary" to preserve their statutory claim. *See again Johnson,* 421 U.S. at 465-66. The union members were not, as the claim has been made, "held in limbo", unable to do anything until the NLRB decision had been reached. Clearly, the plaintiffs had ample time and opportunity to preserve their statutory rights. As they knew or should have known that the grievances would not be processed, they surely could have taken some action in this regard many months earlier. Failing to do so, it is clear that the complaint filed herein is time-barred. Accordingly, the various motions for summary judgment and/or motions to dismiss of all defendants should be granted.

SO ORDERED.

Timothy S. Hogan
United States Senior District Judge

[1]It should be noted that defendants SDI and Scharfenberger have in fact renewed their claim that defendants failed to timely exhaust available contractual grievance procedures prior to bringing this action. In this regard, defendants SDI and Scharfenberger claim that further discovery relating to this issue is unnecessary (doc. 39, p. 9). Plaintiffs' counsel, of course, disagrees (doc. 37, p. 7). Although the defendants' position on this point appears to be solidly supported by the affidavits filed herein, we need not now decide this particular question, since disposition of this case is possible on statute of limitations grounds alone.

[2]Plaintiffs' counsel recently (November 21, 1983) obtained and attached to the memorandum in opposition (doc. 37) affidavits from four of the plaintiffs, including one from Mr. Browning. In these affidavits the four plaintiffs all allege that Mr. Kiser removed Mr. Pence from the matter in January, 1981; that following a stormy meeting in late January, 1981, Mr. Kiser reluctantly reinstated Mr. Pence; that Mr. Pence thereafter filed unfair labor practice charges with the NLRB and pursued those charges through appeal to NLRB general counsel; and that they learned that the appeal had been denied in June, 1981. The four plaintiffs state that it was at that time, *i.e.* June, 1981, that they first learned that the union would not process the original grievances. *(See* Exhibits 3, 4, 5 and 6 to doc. 37). Other evidence of record established that Mr. Pence did in fact pursue two different NLRB charges as representative for the union. *(See* Exhibits 1-6 to the Aff. of Daniel Rosenthal, said affidavit itself attached in support of defendants SDI's and Scharfenberger's original motion for summary judgement, doc. 9).

It appears to be plaintiffs' counsel's position that, in light of the foregoing, the plaintiffs could reasonably have believed that because the union, through attorney Bruce Pence, was pursing NLRB charges, further help would or might be forthcoming thereafter with respect to the original grievance. *(See* the argument, doc. 37, p. 3). Echoing the four affidavits cited above, plaintiffs' counsel asserts that "[a]t that time [June, 1981], Local 100 refused to do anything on [plaintiffs'] behalf, including the processing of their original grievances." (doc. 37, pp.3-4).

This last statement, however, is totally unsupported and indeed flys in the face of the statements made by union representative Browning at his deposition and in his first affidavit. Again, that evidence clearly shows that by late January, 1981 or early February, 1981 union president Kiser had emphatically declared that the union would do nothing on the grievance. From that point on, the plaintiffs knew or should have known that a breach of the duty of fair representation had occurred, as the union's duty in this case was to pursue the contractual grievances of its individual members. The fact that the union reluctantly offered to permit a union hired attorney to pursue an independent remedy offers no support to plaintiffs' case. Regardless of Mr. Pence's actions before the NLRB, the plaintiffs knew or should have known by early February, 1981 that nothing would be done on their contractual grievances. Therefore, the breach occurred at that time.

[3]We note also that the plaintiffs advance the claim that the SDI hiring process was "ongoing and continued until late March or April" (doc. 37, p.4). Citing *Adkins, supra*, the plaintiffs contend that "this was the earliest they could or should have known that a breach of the duty of fair representation had taken place" (doc. 37, p.4). Plaintiffs' argument in this regard is not persuasive. The plaintiffs last worked in late December, 1980. The grievances filed by their representative, union steward Browning, had not been acted upon by either the company or the union. Thus, as previously noted herein, by late January or early February Browning himself realized that no help would be forthcoming from the union. *(See again* Browning Dep. pp.21-22). The fact that SDI may not have completed its hiring until late March or early April is not significant. The plaintiffs did not lose their job at that time. Clearly, their jobs had been lost much earlier. The limitations period thus, barring any tolling, began to run in late January, 1981 or early February, 1981.

Finally, we observe also that, in any event, if the late March or early April date suggested by the plaintiffs is accepted, the filing of the complaint on November 16, 1981 still occurred more than six months after the limitations period. Thus, this later date, even were it accepted, would be of no help to plaintiffs.

APPENDIX B

NO. 84-3122
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH BIPPUS; WALTER BOLTON; EARL BORN; LEROY BOWERS; ROBERT BOWLING; DONALD BROWNING; MICHAEL BROERMAN; WILLIAM CAGEL; WAYNE CHEEK; JERRY CREWS; ROBERT DUMFORD JR.; ROBERT DUMFORD, SR.; WENDELL EVERSOLE; REX FOX; EDWARD FRESON; THOMAS GABBARD; ROLAND GIBSON; DAVID GRAU; JESS HARNEY; JAMES HOF; LAWRENCE HUBER; JERRY KINDRED; JOHN KRIEG; LESLIE LONAKER; WAYNE LYKINS; DONALD LYNCH; GERALD MARTIN; JAMES McFARLAND; STEWARD J. MITCHELL; MICHAEL MOLLOY; MICHAEL O'DONNELL; CHARLES PARKER; JOHN PARKER; JOHN PHILLIPS; BILL PIERSON; JIM RACK; TERRY RETTBERG; GENE ROBERTS; JOE RUSSELL; JOE SARGENT; ROBERT SCHIBI; CHARLES SIBCY; EDWARD SMITH; GEORGE TOFT, JR.; ELSWORTH TRADER; CHARLES VEDDERN; CARL WEBBER; RONALD WHEELER; ANDREW WHITAKER; KEITH WILSON; AND EWELL WYATT,

Plaintiffs-Appellants,

vs.

ORDER

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN & HELPERS OF AMERICA; CLYDE W. WOEBER; IRVIN T. SCHARFENBERGER; READING CENTRAL MIXED CONCRETE; READING CONCRETE INC.; JOHN DOE (A CORPORATION); JOHN DOE (A BUSINESS ENTITY OR ENTITIES); JOHN DOE (AN INDIVIDUALLY/INDIVIDUALS),

Defendants-Appellees.

BEFORE: MARTIN, WELLFORD and MILBURN, Circuit Judges

These Ohio plaintiffs move this Court to stay its proceedings and remand this cause to the district court for the limited purpose of allowing the district court to hold an evidentiary hearing on their Rule 60(b) motion to vacate the district court's judgment so plaintiffs can amend their complaint to allege a new cause of action. The plaintiffs are appealing from a district court judgment dismissing their suit filed under § 301 for the Labor Management Relations Act, 29 U.S.C. § 185, for being untimely. Charging their former company with breach of contract, and their union with breach of its duty of fair representation, plaintiffs alleged that they were illegally discharged by their employer, Reading Concrete, when it sold its assets to the defendants, SDI Reading Concrete, Inc. and Irvin T. Scharfenberger (collectively referred to as "SDI").

Ultimately, the district court decided that plaintiffs' suit was filed beyond the six month time period applicable to hybrid § 301 suits. *DelCostello v. Teamsters,* 462 U.S. 151 (1983). For this ruling, the court chiefly relied on the deposition and affidavit of a Mr. Donald Browning, who is a plaintiff in this suit and the former union steward for the Reading Concrete drivers. The district court concluded from a review of Mr. Browning's testimony that the plaintiffs certainly knew or should have known by February of 1981 that the union was ignoring their grievances filed on January 12 and 13, 1981, and that the union was acting with hostility and in contravention of the desires of these plaintiffs. With the complaint having been filed more than six months later on November 16, 1981, the court concluded that the suit was late and that the time had not otherwise been tolled while the plaintiffs sought relief through an appellate stage with the NLRB.

On appeal, the plaintiffs complain that if the district court had liberally construed the summary judgment proceedings in their favor, then it would have concluded that the plaintiffs could not have reasonably known that the union had breached their duty of fair representation until the first week of June when they learned that they had lost their appeal before the NLRB. Plaintiffs further contend that they received mixed signals from several union representatives which reasonably led them to believe that they were receiving fair representation by the union up until the first week in June of 1981.

Upon consideration of all of the arguments made by the parties in their briefs and papers filed in this cause, this Court concludes that the district court's judgment of dismissal should be affirmed and that the plaintiffs' motion to stay and remand should be denied. The district court properly concluded that the plaintiffs' suit was untimely because their cause of action had accrued more than six months prior to the filing of the suit when they knew or should have known in late January or early February that their discharge and loss of rights would not be fairly challenged by their union. *Shapiro v. Cook United, Inc.,* F.2d , slip op. 83-3087 (6th Cir. May 17, 1985) *(per curiam).* A review of the testimony given by the plaintiffs' former union steward as submitted in his deposition and his affidavit amply reveals an open hostility and unwillingness on the part of the union president in late January and early February of 1981 to have anything to do with the plaintiffs' grievances. This evidence of open hostility toward the plaintiffs was not assuaged or contradicted by other remarks made by the union's business agent and by the plaintiffs' false hope of success before the NLRB. Although the business agent told Mr. Browning that the union would address the grievances after the legality of the sale was resolved, he also said that his hands were tied and that he could do nothing for the plaintiffs unless he received authorization from the union

president. Plaintiffs certainly could not reasonably have invested any hope of fair representation on the remarks made by the business agent, however, because the union president had already unequivocally expressed his opposition to the plaintiffs' grievances. It was also not reasonable for the plaintiffs to ignore this expression of hostile opposition and to believe that the union had not breached their duty of fair representation because it had reluctantly allowed outside counsel to file a charge of unfair labor practice with the NLRB in behalf of the plaintiffs. The plaintiffs can also not demonstrate reasonable expectation of fair union representation under these circumstances by further relying on cases which supposedly hold that withdrawal of union legal representation during the pursuit of grievance procedures can amount to unfair representation. It is, nonetheless, well-settled that pursuit of relief with the NLRB does not toll the time to file a hybrid § 301 suit. *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983) *(per curiam), cert. denied,* U.S. , 104 S.Ct. 3538 (1984); *Estades v. Harry Stevens, Inc.*, 593 F.Supp. 778,782 (D. P.R. 1984); *Bey v. Williams*, 590 F.Supp. 1150, 1154 (W.D. Pa. 1984); *Boyd v. Teamsters Local*, 553, 589 F.Supp. 794, 796 (S.D. N.Y. 1984).

Under these circumstances, it is clear that the plaintiffs' suit was untimely because their cause of action had accrued more than six months prior to the filing of their suit on November 16, 1981, when they knew or reasonably should have known in late January or early February of 1981 that the union would never fairly present their grievances to their previous employer.

Finally, it is concluded that plaintiffs' motion to stay and remand should be denied for several reasons. It is initially observed that a dismissal of a suit for being barred by a statute of limitations may be a judgement on the merits to which *res judicata* can attach. *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981); *Cemer v. Marathon Oil Co.*, 583 F.2d 831, 832 (6th Cir. 1978) *(per curiam).* The plaintiffs may,

however, present their same equitable arguments which are asserted to support their Rule 60 (b) motion to support an argument, to be made in the district court having jurisdiction over their second suit, whether invocation of *res judicata* would contravene an overriding public policy or result in manifest injustice. *See Westwood Chemical Co., Inc. v. Kulick,* 656 F.2d 1224, 1228-31 (6th Cir. 1981), and cases cited therein. We deny the plaintiffs' motion to stay and remand to avoid the anomaly of having the parties' dispute be pending before an appellate court and two district court judges simultaneously.

For these reasons, this panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The plaintiffs' motion is accordingly, denied and the district court's judgement is hereby affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

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Clerk